78-1764

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-

JAMES G. RYAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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INDEX

CITATIONS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78

JAMES G. RYAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petioner, James G. Ryan, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this cause on March 2, 1979, with Rehearing denied, April 25, 1979.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, which was ordered not to be published, and the order of that court denying the petition for the rehearing appear in the appendix to this petition. The District Court's unsigned Minute Orders, without opinion, denying Petitioner's Motion for New Trial under Rule 33 of Federal Rules of Criminal Procedure, and denying Petitioner's Motion to Dismiss Indictment, also appear in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1979. An Order denying the petition for rehearing was entered on April 25, 1979. An order was entered extending the time for filing a petition for writ of certiorari to June 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

1. Was the Petitioner denied his Fifth and Fourteeth Amendment, Collateral Estoppel protection against multiple prosecution by the Court's refusal to dismiss the indictment against him, upon a clear showing of violation of the Justice Department's Petite Policy. (See Memorandum Press Release, April 6, 1959), as well as a clear showing of the constitutional Collateral Estoppel protection, (See *Ashe v. Swenson,* 397 U.S. 436 (1970); *U.S. v. Oppenheimer* 292 U.S. 85 (1916), *Rinaldi v. U.S.* 54 L. Cd. 2d 207 (1977)?

2. Does the Justice Department (a part of the Executive Branch of Government) have jurisdiction to construe, with finality, the Fifth Amendment 'double jeopardy' clause and the Fourteenth Amendment 'due process' clause of the United States Constitution, or does this intradepartmental, unilateral, discretionary determination of the Department of Justice through its so-called "Petite Policy" constitute both, an infrigement by the Executive Branch of government into an area of jurisdiction reserved by the United States Constitution to the Federal Judiciary and, a violation of the doctrine of "Separation of Powers"?

3. Is a criminal indictment fatally defective as to a defendant when it alleges only conspiracy charges against said defendant, with no substantive offense alleged, (where the substantive offense, if alleged, would have required two or more persons for its commission), in violation of the common law Wharton Rule, cf. Oral Argument of Prof. Thomas J. O'Toole, Esq., as Amicus Curiae, December 8, 1978, before the U.S. Court of Appeals for the Ninth Circuit)?

4. Was the Petitioner denied a trial by a fair and impartial jury, a Sixth Amendment Right, by reason of an uncontroverted showing of outside influence upon one or more jurors, and by reason of communication by non-juror with juror concerning the trial during a recess in jury delibertion. See *Parker v. Gladden* 385 U.S. 363 (1966)?

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article III provides:

   "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . .".

2. The Fifth Amendment provides:

   "No person shall be . . . subject for the same offense to be twice put in jeopardy of life, of limb . . . nor be deprived of life, liberty, or property, without due process of law; . . .".

3. The Sixth Amendment provides:

   "In all *criminal prosecutions* the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ." (Emphasis added).

4. The Fourteenth Amendment provides:

   " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.".

STATEMENT OF THE CASE

Petitioner RYAN was indicted on or about April 27, 1973, for alleged conspiracy to violate 18 U.S.C. 1952(2) and 371, following three (3) unsuccessful State of Nevada prosecutions for the same act or acts. The Federal Indictment failed to allege a substantive offense on the part of Petitioner RYAN, (See appendix cf., Indictment entered April 27, 1973).

Ryan was tried and convicted in the U.S. District Court of the District of Nevada in a fourteen day Jury trial in March 1974.

On June 16, 1977, Ryan filed a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. In this motion for new trial an evidentiary hearing was requested. The U.S. Attorney in his response to this motion, also requested that the district court grant an evidentiary hearing on June 24, 1977.

The District Court on July 13, 1977, by Minute Order, granted Ryan an evidentiary hearing, which was never held.

On March 29, 1978, Ryan filed a motion to dismiss his indictment based upon a violation of the Justice Department's "Petite Policy", as discussed by this Court in *Rinaldi v. U.S.*, 54 L.Ed.2d 207 (1977).

By its very terms the Petite Policy requires personal supervision and authorization by the Attorney General of the United States upon appropriate study and recommendation by the Assistant Attorney General of the United States in charge of the Criminal Division, who must have found that compelling interests of federal law enforcement exist justifying a federal prosecution after a state prosecution for the same act or acts. See Justice Department Memorandum and Press Release, dated April 6, 1959, published that date in the New York Times, Page 1, Column 4, and Page 19, Columns 1 and 2.

During the time the Ryan indictment was being sought by the U.S. Attorney, which indictment was returned on April 27, 1973, the Honorable Richard G. Kleindienst was the Attorney General of the United States and thus the official charged with authority for the enforcement and implementation of the Petite Policy.

Had the Petite Policy memorandum been complied with, prior to any federal prosecution of petitioner Ryan, the U.S. Attorney, V. DeVoe Heaton would have had to submit a written recommendation to the Assistant Attorney General in charge of the Criminal Division of the Department of Justice. The Assistant Attorney General in charge of the Criminal Division would then have had to study and review the matter and recommend in writing to the Attorney General of the United States that compelling interests of federal law enforcement existed to justify a multiple prosecution.

The United States Attorney General would then have had to personally review the matter and make written public authorization stating that compelling interests of federal law enforcement justified a federal prosecution after a state criminal prosecution. (N.B. further state prosecution was barred.)

Mr. Kleindienst indicates that he had no present recollection of the Ryan matter having been submitted to him for approval in his capacity as Attorney General of the United States.

United States Attorney V. DeVoe Heaton testified under oath that the decision to proceed with a federal prosecution after the defendant Ryan had been subjected to three state prosecutions, had been unilaterally his. He further testified that from January to April 27, 1973 (date of return of the Ryan indictment), his sole contact with the Department of Justice Criminal Division in this matter had been one phone call sometime during that period to a "Mr. Burke" or "Mr. Berg", in Washington. He testified that the sole purpose of that call was, in effect, to discover whether the Travel Act, 18 U.S.C.A. 1952, could be construed as applying to a prospective defendant who had no direct nexus with interstate commerce. Mr. Heaton stated that all research and review in the so-called Ryan Investigation had been done entirely by him, that he had not even assigned any research to his assistants. He stated under oath that the decision to present the Ryan matter to a federal grand jury had been solely his.

Mr. Heaton also admitted that he was fully aware of the three state prosecutions of Mr. Ryan, and of the Nevada Supreme Court decision that the State Attorney General lacked jurisdiction to prosecute Mr. Ryan by "information" after the conclusion of the previous prosecution of Mr. Ryan (See Testimony of V. DeVoe Heaton, transcript, *U.S. v. Ryan,* Vol. I - A, October 25 and 26, 1973, pp. 110 - 116, passim).

The present U. S. Attorney has admitted, in response to Ryan's motion for dismissal of indictment, that Petite Policy was not complied with in this case.

Additional errors by the courts below, include the fact that uncontroverted evidence, by sworn statements, exists in the record that undue outside influences were exerted upon juror, Elsa Bagwell (by means of discussion and advice concerning the case, from her husband, during a recess in jury deliberation), and upon other jurors who deliberated, due to the notarity of a then outstanding indictment for perjury against a key Ryan defense witness (causing them to feel this witness to be less credible), See *Parker v. Gladden,* supra. Somehow, the court below misread the contents of these statements and affidavits. Further, the court below even failed to address itself to the jurisdictional impact of violation of the common law Wharton Rule, which violation was a fatal defect in the indictment (See argument of Prof. Thomas J. O'Toole, Esq. as Amicus Curiae in behalf of Southern Nevada Central Labor Council.

Thus Ryan perfected his appeal from the District Court's Minute Orders entered April 27, 1978, and March 24, 1978, to the U.S. Ninth Circuit. National Association for the Advancement of Colored People and Southern Nevada Central Labor Council joined Ryan in the appeal as Amicus Curiae on the question of violation of Petite Policy, in briefs submitted and accepted by the Ninth Circuit. On December 8, 1978, the appeal was heard with Professor Thomas J. O'Toole, Esquire, arguing for and representing Southern Nevada Central Labor Council as Amicus Curiae.

On March 2, 1979, in an unpublished opinion, the Ninth Circuit affirmed the decisions of the District Court. On April 25, 1979, the Ninth Circuit denied Ryan's Petition for Rehearing En Banc, and amended its March 2, 1979 decision.

REASONS FOR GRANTING THE WRIT

1. The ruling of the court below denied the petitioner his Fifth and Fourteenth Amendment 'Collateral Estoppel' protection, (see *Ashe v. Swenson,* supra., by assuming that the Jutice Department's Petite Policy can be violated only in cases of clear, common law 'Double Jeopardy', whereas Petite Policy, itself, speaks only of multiple 'criminal prosecution' (a constitutional phrase defined by this court in *Kirby v. Illinois,* 406 U.S. 682 (1972), See also *Coleman v. Alaman,* 399 U.S. I (1970). Additionally, the court below misquoted the Justice Department's Petite Policy Press Release of April 6, 1959, on page 5 at lines 31 and 32, and on page 6 at lines 1 and 2, (See Appendix A, Ninth Circuit Opinion and Appendix F, Petite Policy, Memorandum Press Release).

The scope of Petite Policy has not been, but should be decided by this Court.

2. The Justice Department's Petite Policy is a unilateral and amorphous policy against 'multiple prosecution', which has never been enacted into law, nor published as a part of the Code of Federal Regulations. It has been subject to shifting guidelines of executive construction and is an infringement by an Executive department upon the jurisdiction and junction of the Federal Judiciary as defined in Article III of the United States Constitution, (See *Marbury v. Madison* 1 Cranch 137, 2 L.Ed. 60 (1803). The United States Constitution reserves exclusively to the Federal Judiciary the power to construe the provisions of that constitution. The Justice Department has, through its Petite Policy, enabled itself to infringe upon the jurisdiction of the Federal Judiciary, and thus to violate the doctrine of "Separation of Powers".

Petite Policy in its current state directly violates Article III of the United States Constitution. Petite Policy amounts to an independent, quasi legislative quasi judicial exercise in "discretionary justice", lacking the mandatory prerequisite of an appropriate delegation of such authority.

3. An indictment is fatally defective when no substantive offense is alleged on the part of a defendant when two or more persons would have been required to commit the substantive offense referred to but not alleged, because it violates the common law Wharton Rule as construed by this court in *Ianelli v. U.S.* 420 U.S. 770, 1975, and *Gebardi v. U.S.* 287 U.S. 112 (1932).

4. The ruling of the court below on the Sixth Amendment right to trial by a fair and impartial jury was based upon a mis-

reading of the evidence and is in conflict with this Courts decision in *Parker v. Gladden,* supra, and with that Amendment.

CONCLUSION

For the reasons stated it is respectfully prayed that a writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

EUGENIA PINTOS OHRENSCHALL
Attorney for Petitioner
P. O. Box 42372 - Huntridge Sta.
Las Vegas, Nv. 89104
Phone (702) 384-5992

CERTIFICATE OF SERVICE

I do hereby certify that I did deposit on this 23 day of May, 1979, a copy of the foregoing Petitioner's Petition for Writ of Certiorari, in a sealed envelope, postage prepaid, at Las Vegas, Nevada, addressed to each of the following:

The Honorable Wade Hampton McCree, Jr.
Solicitor General of the United States
United States Department of Justice
Constitution Ave. betwn 9th & 10th St. - Rm. 5143
Washington, D. C. 20530

Chas. E. Carter & Nathaniel Jones, Esqs.,
N.A.A.C.P.
1790 Broadway - Tenth Floor
New York, New York 10019

Southern Nevada Central Labor Council
4321 East Bonanza Road
Las Vegas, Nv. 89110
Attn: Mr. James Arnold

Thomas J. O'Toole, Esquire
Suffolk University Law School
Boston, Massachusetts 02114

Dated this 23 day of May, 1979.

Eugenia Pintos

APPENDIX

APPENDIX "A"

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES G. RYAN, *Defendant/Appellant,* vs. UNITED STATES OF AMERICA, *Plaintiff/Appellee.*	No.'s 78-1845 78-2154 & 78-2155 MEMORANDUM

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

Before: BROWNING and CARTER, Circuit Judges, and ALBERT C. WOLLENBERG, Senior District Judge.*

In 1972, Appellant Ryan, a former Clark County, Nevada, Commissioner, accepted $8,000 intended as a bribe to persuade him to vote to rezone certain land for development purposes. A criminal complaint was filed in Justice Court, charging him with receiving a bribe but that charge was held in abeyance while the Nevada State Attorney General sought an indictment. The grand jury did not return an indictment, and thereafter, the criminal complaint was dismissed by a magistrate, who conducted a preliminary hearing and found no probable cause to support further prosecution. Next, the Attorney General reentered the fray, filing an information in (state) district court. It was eventually dismissed by the Nevada Supreme Court because the statute under which the Attorney General sought to prosecute, N.R.S. 173.035(2), conferred no power on him to do so. *Ryan v. Eighth Judicial Dist. Ct. in and for Cty. of Clark,*

*Honorable Albert C. Wollenberg, Senior District Judge, Northern District of California, sitting by designation.

88 Nev. 638, 503 P.2d 842 (1972). No further state action followed.

In 1973, Ryan and others were indicted by a federal grand jury and were subsequently convicted of violating 18 U.S.C. § 371 (conspiracy) and 18 U.S.C. § 1952 (the "Travel Act") for having used the facilities of interstate commerce to engage in prohibited activities, i.e., the bribery scheme. On appeal, the convictions were affirmed. *United States v. Ryan,* 548 F.2d 782 (9th Cir.), *cert. denied sub. nom. Zeldin v. United States,* 429 U.S. 939 (1976), *Wilson v. United States,* 430 U.S. 965 (1977). Ryan appeals here from the denial of his motion for a new trial (No. 78-1845), from the denial of his motion to dismiss the indictment because it violated the government's "Petite" policy (No. 78-2154), and from the denial of his motion to quash the order denying him a new trial (No. 78-2155).

DISCUSSION

New Evidence

Ryan first contends that it was error to refuse to grant a new trial based on alleged new evidence in up to 40 affidavits he submitted for that purpose after his initial conviction. Rule 33 of the Federal Rules of Criminal Procedure allows the granting of a motion for a new trial based on newly discovered evidence "if required in the interest of justice." This court has held that such motions should be granted only when it appears from the motion and from the affidavits that (1) the evidence relied on is in fact newly discovered, (2) the moving party has been diligent, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material, and (5) a new trial would probably produce an acquittal. *Evalt v. United States,* 382 F.2d 424 (9th Cir. 1967); *Wright v. United States,* 353 F.2d 362 (9th Cir. 1965). *See United States v. DePalma,* 461 F.2d 240 (9th Cir. 1972). We have reviewed all the affidavits submitted by Ryan in his efforts to obtain a new trial. None of them satifies the requirements listed above. Those upon which Ryan appears to rely most heavily contain no new evidence, but show instead that well before trial, Ryan was aware of potential witnesses with certain information now charterized as "new". Other affidavits contain inadmissible hearsay and thus do not constitute new evidence. Others purport to show that a key witness (one Mizera) was coerced into testifying on behalf of the government. But the voluntariness of his cooperation was previously dealt with by this court in *United States v. Ryan,* 548 F.2d at 789-90, and the affidavits raise no legal or factual questions not dealt with fully there. This alleged error is without merit.

Jury Prejudice and Misconduct

Next, Ryan alleges that evidence of juror prejudice and misconduct mandates a new trial. He claims that the jury voted improperly in that it voted on the guilt or innocence of all defendants at the same time rather than separately as allegedly instructed by the court. In fact, however, the court did not so instruct, but rather it instructed that the jury should *consider* the guilt or innocence of each defendant separately. No affidavits claim this was not done. More importantly, an inquiry of this type into jury deliberations is precluded by Rule 606(b), Federal Rules of Evidence. See *Farmers Coop. Elev, Ass'n. v. Strand,* 382 F.2d 224 (8th Cir. 1967); *Walker v. United States,* 298 F.2d 217 (9th Cir. 1962).

Ryan's allegations of prejudicial outside influence on juror Bagwell are likewise without merit. Neither her conversations with her husband nor the medical attention she received from her doctor, were in violation of *Parker v. Gladden,* 385 U.S. 363 (1966) because the type of outside influence which the Supreme Court criticized there was not present here. Also, contrary to Ryan's assertion, her husband did not give her the so-called *Allen* charge. *See Allen v. United States,* 164 U.S. 492 (1896). Other allegations regarding juror Bagwell are likewise without merit.

One alternate juror admitted in an affidavit that she was aware, during the trial, that a key defense witness was under indictment for perjury, and that she was prejudiced against Ryan for that reason. Had she not been an alternate juoror, or had she actually deliberated on the verdict, this admission would have provided possible grounds for granting a new trial

under the reasoning found in *Parker v. Gladden, supra.*[1] She did not deliberate, however, and there is no evidence that other jurors who actually deliberated knew of the indictment. Thus this admission provides no reason to grant a new trial.

The affidavit which purports to show that one juror was prejudiced against Ryan because her father had previously had business dealings with him and believed him to be "guilty" constitutes inadmissible hearsay, and is of questionable materiality because it reports a statement made by her husband to an investigator three years after the trial, and does not indicate that the juror herself knew of or suspected her father's alleged prejudice before or during the trial.

An Evidentiary Hearing was not Required

Ryan's final contention regarding evidentiary matters deals with the trial judge's refusal to hold a hearing to consider evidence in support of Ryan's motion for a new trial after having granted the hearing initially. He argues that because both Ryan and the government agreed that a hearing should be held, the trial judge had no discretion to refuse to hold it, citing *Lyles v. United States,* 272 F.2d 910 (5th Cir. 1959). The Record shows that when Ryan requested the hearing, he had submitted only two affidavits in support of the motion for a new trial, and that the government merely concurred in the request for a hearing in order to define more precisely the issues to be resolved. Thereafter, Ryan submitted an additional 38 affidavits, which added significantly to the trial judge's ability to understand the basis for Ryan's motion. In *Lyles, supra,* on the other hand, both the government and the defendant had affirmatively moved for a hearing, and the few affidavits submitted there were meager at best. Given the facts and circumstances of this case, especially the abundance of information available to the trial judge in the 40 affidavits, we hold that the trial judge did not abuse his discretion in vacating the order which originally granted the evidentiary hearing. It was entirely proper to follow the ordinary practice of deciding the merits of a motion for a new trial on the basis of affidavits alone. *E.g., Lyles, supra; Gordon v. United States,* 178 F.2d 896 (6th Cir. 1949), *cert. denied,* 399 U.S. 935 (1953).

In summary, it was not against the weight of the evidence to deny Ryan's motion for a new trial, none of the affidavits presented by Ryan contains new evidence that is material or admissible, and it was not an abuse of discretion to deny the evidentiary hearing.

The Petite Policy

Ryan next contends that it was a violation of the government's "Petite" policy (*Petite v. United States,* 361 U.S. 529 (1960)) to prosecute him under federal law after three unsuccessful attempts to prosecute him under Nevada law for essentially the same acts. The Justice Department's policy prohibits federal prosecution "where there has already been a state prosecution for substantially the same act or acts . . ." unless the U.S. Attorney recommends and an Assistant U.S. Attorney General approves. *See* Department of Justice Press Release, dated April 16, 1959. The policy was formulated in response to two Supreme Court cases, *Abbate v. United States,* 359 U.S. 187 (1959), and *Barkus v. Illinois,* 359 U.S. 121 (1959), which held that prosecution by both state and federal authorities for the same illegal acts did not violate double jeopardy prohibitions of the Fifth Amendment to the Constitution.

That policy was not violated here. It is clear from *Ryan v. Eighth Judicial Dist. Ct. in and for Cty. of Clark,* 88 Nev. 638, 503 P.2d 842 (1972), that jeopardy never attached in any of the state court proceedings. The Nevada State Supreme Court ruled that the Nevada Attorney General had no power to file an infomation against Ryan, not because jeopardy had attached, but because the statute under which the information was sought required at least the concurrence of a district attorney. Nothing in the opinion precluded further prosecution if the proper procedures were followed. It is also fairly clear that the scope of the Petite policy was intended to be coextensive with double jeopardy principles; that is, it was intended to protect against the harsh results of double jeopardy in situations where that constitutional principle does not apply because of principles of federalism. The Supreme Court recently stated, with reference to the Petite Policy:

"Although not constitutionally mandated, this Executive policy serves to protect interest which, but for the 'dual sovereignty' principle inherent in our federal system, would be embraced by the Double Jeopardy Clause."

Rinaldi v. United States, 434 U.S. 22, 29 (1977).

Because jeopardy never attached, the Petite policy was not violated, and the trial judge's denial of the motion to dismiss the indictment was therefore not erroneous.

Ryan's contentions regarding collateral estoppel are likewise without merit. No issue of ultimate fact was ever decided in any state court proceeding. *See Ashe v. Swenson,* 397 U.S. 436 (1970).

We have carefully reviewed other claims raised by Ryan and we find no merit in them. The decisions of the trial court are therefore, in all respects, AFFIRMED.

[1]The Court stated there that the defendant was entitled to a trial by "12, not 9 or even 10, impartial and unprejudiced jurors." 385 U.S. at 366. The statement was made in the context of the fact that in Oregon, where the controversy arose, the votes of only 10 of 12 jurors were necessary to convict; the point being that every single deliberating juror must be free from prejudice. Ryan had his 12 unprejudiced jurors, and *Parker v. Gladden* requires no more.

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES G. RYAN, *Defendant-Appellant,* v. UNITED STATES OF AMERICA, *Plaintiff-Appellee.*	Nos. 78-1845 78-2154 78-2155

ORDER DENYING PETITION FOR REHEARING and REJECTING SUGGESTION FOR REHEARING EN BANC

Before: JUDGES BROWNING and CARTER, Circut Judges, and WOLLENBERG, District Judge.

The panel in the above entitled case has unanimously voted to deny the petition for rehearing.

The panel has voted to amend the unpublished Memorandum on page 1, line 20 of the slip sheet dated March 2, 1979 to insert "$5,000" in place of "$8,000."

The suggestion for rehearing en banc having been circulated to all active judges and no judge having voted for a rehearing en banc.

IT IS ORDERED that the petition for rehearing is denied; that the suggestion for rehearing en banc is rejected, and the slip sheet dated March 2, 1979 is amended as set forth above.

APPENDIX "C"

V. DeVOE HEATON
United States Attorney
PAUL S. GOLDMAN
Assistant United States Attorney
300 Las Vegas Blvd. South
Las Vegas, Nevada 89101
385-6336

IN THE UNITED STATES DISTRICT COURT
FOR THE DISRICT OF NEVADA

UNITED STATES OF AMERICA, *Plantiff,* v. JAMES G. RYAN, ADRIAN WILSON and BERNARD ZELDIN, *Defendants.*	Criminal - LV 2698

INDICTMENT for violation of Title 18 United States Code, Sections 1952, 2 and 371

THE GRAND JURY CHARGES:

COUNT I

From on or about the 1st day of January, 1972, and continuously thereafter up to and including the 23rd day of May, 1972, in the Federal Judicial District of Nevada and elsewhere, JAMES G. RYAN, ADRIAN WILSON and BERNARD ZELDIN, the defendants herein, wilfully and knowingly did combine, conspire, confederate and agree together with each other and with Miro "Mike" Mizera, named as a co-conspirator herein but not as a defendant, and with divers other persons to the Grand Jury, unknown, to commit offenses against the United

States: that is, knowingly and wilfully traveling in interstate commerce and using and causing to be used wire communication and other facilities in interstate commerce between the State of California and Clark County in the State and Federal Judicial District of Nevada, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, bribery, in connection with a rezoning application for a certain piece of property located in Clark County, Nevada, in violation of the laws of the State of Nevada, to wit: Nevada Revised Statutes, Title 16, Chapter 197, Sections 197.020, 197.030, and 197.040, and thereby in violation of Title 18, United States Code, Section 1952.

1. It was part of said conspiracy that the unindicted co-conspirator Miro "Mike" Mizera, during the periods named in this indictment, communicated telephonically from Las Vegas, Nevada, to defendant ADRIAN WILSON in the State of California.

2. It was further a part of said conspiracy that the unindicted co-conspirator Miro "Mike" Mizera would contact defendant JAMES G. RYAN and other County Commissioners for the purpose of obtaining favorable votes on an application for a zoning change in relation to a certain piece of property located in Clark County, Nevada.

3. It was further a part of said conspiracy that unindicted co-conspirator Miro "Mike" Mizera would meet with defendant JAMES G. RYAN to pay to defendant RYAN a sum of maney given to Mizera by co-defendants ADRIAN WILSON and BERNARD ZELDIN in return for defendant RYAN'S favorable vote on a rezoning application.

4. It was further a part of said conspiracy that defendant JAMES G. RYAN would use a fictitious name when communicating with unindicted co-conspirator Miro "Mike" Mizera.

5. At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

A. On May 17, 1972, defendant ADRIAN WILSON

withdrew a sum of money from the Security Pacific National Bank, Los Angeles, California.

B. On May 21, 1972, defendant ADRIAN WILSON met with unindicted co-conspirator Miro "Mike" Mizera at the Desert Inn Hotel, Las Vegas, Nevada.

C. On May 22, 1972, defendant JAMES G. RYAN, at a meeting of the Clark County Commissioners, moved for approvel of and voted for a rezoning application then pending before the Clark County Commissioners.

D. On May 22, 1972, following the aforementioned meeting of the Clark County Commissioners, defendants ADRIAN WILSON, BERNARD ZELDIN and unindicted co-conspirator Miro "Mike" Mizera met at the Tam O'Shanter Motel in Las Vegas, Nevada.

E. On May 23, 1972, unindicted co-conspirator Miro "Mike" Mizera delivered to defendant JAMES G. RYAN a sum of money totaling $5,000.00.

All in violation of Title 18, United States Code, Section 371.

COUNT II

That on or about the 1st day of January, 1972, up to and including the 23rd day of May, 1972, in the Federal Judicial District of Nevada, JAMES G. RYAN, ADRIAN WILSON and BERNARD ZELDIN, defendants herein, did travel in interstate commerce between the State of California and Clark County, in the State and Federal Judicial District of Nevada, and did use and cause to be used wire communication and other facilities in interstate commerce, all with the intent to promote, manage, establish, carry on, and to facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is bribery in connection with a rezoning application for a certain piece of property located in Clark County, Nevada, in violation of the laws of the State of Nevada, to wit: Nevada Revised Statutes, Title 16, Chapter 197, Sections 197.020, 197.030 and 197.040, and thereafter performed and caused to be performed acts to promote, manage, establish, carry on, and to facilitate the promotion, management, establishment and carrying on of said

unlawful activity; all in violation of Title 18, United States Code, Section 1952 and Title 18, United States Code, Section 2.

A TRUE BILL:

Warren R. Neustrom
FOREMAN OF THE GRAND JURY

V. DeVoe Heaton
V. DeVOE HEATON
United States Attorney

APPENDIX "D"

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS, NEVADA

UNITED STATES OF AMERICA, *vs.* JAMES G. RYAN, ET AL,	CRIMINAL - LV 2698. RDF MINUTES OF THE COURT DATED: March 24, 1978

PRESENT: HON. ROGER D. FOLEY, District Judge

Deputy Clerk: FAYE McMILLAN
Reporter: NONE APPEARING

U. S. Attorney by: NONE APPEARING

Counsel for Defendant(s): NONE APPEARING

Defendant(s) is/are not present.

MINUTE ORDER IN CHAMBERS XXX

IT IS ORDERED that the Government's motion to forfeit bribe moneys, filed June 10, 1977, is hereby granted.

IT IS FURTHER ORDERED that Defendant Ryan's motion for a new trial, filed June 16, 1977, is hereby denied.

IT IS FURTHER ORDERED that Defendant Wilson's motion to withdraw monies deposited in Court, filed February 13, 1978, is hereby denied.

APPENDIX "E"

UNITED STATES DISTRICT COURT
DISRICT OF NEVADA
LAS VEGAS, NEVADA

UNITED STATES OF AMERICA, vs. JAMES G. RYAN, ET AL.

CRIMINAL - LV - 2698, RDF

MINUTES OF
THE COURT

DATED: April 27, 1978

PRESENT: HON. ROGER D. FOLEY, District Judge

Deputy Clerk: FAYE McMILLAN

Reporter: NONE APPEARING

U. S. Attorney by: NONE APPEARING

Counsel for Defendant(s): NONE APPEARING

Defendant(s) is/ not present.

MINUTE ORDER IN CHAMBERS XXX

IT IS ORDERED that the following listed motions are hereby denied:

1. Motion for dismissal of the indictment against Defendant Ryan based upon violation of the Petite-Rinaldi doctrine, filed on behalf of Defendant Ryan, on March 29, 1978.
2. Motion to quash the Minute Order, entered March 24, 1978, as to Defendant Ryan and to reconsider Defendant

Ryan's motion for a new trial, filed on behalf of Defendant Ryan, on March 30, 1978

3. Motion to strike the local U.S. Attorney's request, erroneously made in the form of an apparant motion to dismiss Defendant Ryan's motion to quash, filed on behalf of Defendant Ryan, on April 20, 1978.

4. Motion to strike the local U.S. Attorney's request erroneously made in the form of an apparent motion to deny Defendant Ryan's motion to dismiss indictment, filed on behalf of Defendant Ryan, on April 20, 1978.

APPENDIX "F"

CRIMINAL PROSECUTION

DEPARTMENT OF JUSTICE

SEAL

FOR RELEASE TO A.M. NEWSPAPERS
MONDAY, APRIL 6, 1959

Ninety four United States Attorneys from as many districts in the states and territories, will convene here Monday for a two-day conference with officials of the Department of Justice. They will discuss problems of Federal law enforcement, with especial reference to the drive on organized crime and racketeering, and intra-departmental administrative matters.

The group will be welcomed Monday morning by Attorney General William P. Rogers and one of the first matters to be presented to them will be the following statement:

MEMORANDUM TO THE
UNITED STATES ATTORNEYS

In two decisions on March 30, 1959, the Supreme Court of the United States reaffirmed the existence of a power to prosecute a defendant under both federal and state law for the same act or acts. That power, which the Court held is inherent in our federal system, has been used sparingly by the Department of Justice in the past. The purpose of this memorandum is to insure that in the future we continue that policy. After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling.

In *Abbate v. United States* and *Bartkus v. Illinois* the Supreme Court held that there is no violation of the double jeopardy prohibition or of the due process clause of our federal Constitution where there are prosecutions of the defendant, both in the state and in the federal court, based upon the same act or acts.

This ruling reaffirmed the holding in *United States v. Lanza,*

260 U.S. 377, decided by the Supreme Court in 1922. In that case Chief Justice Taft, speaking for a unanimous Court, said:

> "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereingty, not that of the other.
>
> "It follows that an act denounced as a crime by both national and state sovereingties is an offense against the peace and dignity of both and may be punished by each."

But the mere existence of a power, of course, does not mean that it should necessarily be exercised. In the *Bartkus* case the Court said:

> "The men who wrote the Constitution as well as the citizens of the member states of the Confederation were fearful of the power of centralized government and sought to limit its power. Mr. Justice Brandeis has written that separation of powers was adopted in the Constitution 'not to promote efficiency but to preclude the exercise of arbitrary power.' Time has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard against arbitrary government. The greatest self-restraint is necessary *When that federal system yields results with which a court is in little sympathy.*" (Emphasis added)

The Court held then that precedent, experience and reason supported the conclusion of separate federal and state offenses.

It is our duty to observe not only the rulings of the Court but the spirit of the rulings as well. In effect, the Court said that although the rule of the *Lanza* case is sound law, enforcement officers should use care in applying it.

Applied indiscriminately and with bad judgment it, like most rules of law, could cause considerable hardship. Applied wisely it is a rule that is in the public interest. Consequently — as the Court clearly indicated — those of us charged with law enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area.

Cooperation between federal and state prosecutive officers is essential if the gears of the federal and state systems are to mesh properly. We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the public interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then consideration of a second prosecution very seldom should arise.

In such event I doubt that it is wise or practical to attempt to formulate detailed rules to deal with the complex situation which might develop, particularly because a series of related acts are often involved. However, no federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation should be approved by the Assistant Attorney General in charge of the Division without having it first brought to my attention.

/s/ William P. Rogers
Attorney General

APPENDIX "G"

88 Nev., Advance Opinion 172

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES RYAN, PETITIONER, *v.* EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, RESPONDENT.

No. 7033

November 30, 1972

Petition for writs of prohibition and habeas corpus.

WRITS GRANTED.

MOWBRAY, J., dissented

Harry E. Claiborne and *Annette R. Quintana*, of Las Vegas for Petitioner.

Robert List, Attorney General, and *Herbert F. Ahlswede*, Chief Deputy Attorney General, for Respondent.

OPINION

By the Court, THOMPSON, J.:

This original proceeding for writs of prohibition and habeas corpus seeks to stop further action in the Eighth Judicial District Court upon an information filed independently by the Attorney General of Nevada with leave of that court, and to secure the petitioner's discharge from restraint occasioned thereby. The information purportedly was filed pursuant to the provisions of NRS 173.035(2) which allows the district attorney, by leave of court, to file such an information following a preliminary examination in which the accused has been discharged.[1] It is the contention of the petitioner, James Ryan, that the mentioned statute does not invest the attorney general with authority to file such an information, that the district court could not grant him permission to do so, and that such action and any further proceedings thereon is and would be void for want of jurisdiction.

The information charges James Ryan, as a public officer, with receiving a bribe in violation of NRS 197.040. Originally, the attorney general commenced the prosecution of Ryan by filing a criminal complaint. Action thereon was held in abeyance while the attorney general presented his case to the grand jury of Clark County, which body declined to indict. Thereafter, a preliminary examination was held upon the criminal complaint and the charge was dismissed by the magistrate for want of probable cause. Following these adversities, the attorney general sought to initiate prosecution through the auspices of NRS 173.035(2). He did so independently and without requesting the district attorney of Clark County to act. Whether the attorney general may proceed in that manner is the only issue we need consider.

1. NRS 173.035(2) does not expressly grant such authority to the attorney general. Only the district attorney is given the right to file an information with leave of court following a preliminary examination in which the accused has been discharged.

[1]NRS 173.035. 1. An information may be filed against any person for any offense when the person:

(a) . . . .

(b) . . . .

2. If, however, upon the preliminary examination the accused has been discharged, or the affidavit or complaint upon which the examination has been held has not been delivered to the clerk of the proper court, the district attorney may, upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof, upon being furnished with the names of the witnesses for the prosecution, by leave of the court first had, file an information, and process shall forthwith issue thereon. The affidavit mentioned herein need not be filed in cases where the defendant has waived a preliminary examination, or upon such preliminary examination has been bound over to appear at the court having jurisdiction.

The statute is designed to provide a safety valve against an arbitrary or mistaken decision of the magistrate, Maes v. Sheriff, 86 Nev. 317, 468 P.2d 332 (1970); Martin v. Sheriff, 88 Nev. 303,496 P.2d 754 (1972), in a prosecution initiated by the district attorney and erroneously dismissed. Indeed, our statutory scheme invests control of the information process in the district attorney to the exclusion of others. The legislature wisely has forbidden dual control. For example, NRS 173.045(1) provides that all information shall be filed by the district attorney. He may elect not to file an information after a preliminary examination has occurred and the accused has been held to answer, but must give his reasons in writing for not doing so. NRS 173.055(2). On the other hand, he may file an information with leave of court, notwithstanding a preliminary examination in which the accused has been discharged. NRS 173.035(2). These provisions declare the legislative purpose to grant the district attorney of the proper county control over the information process. The attorney general is not mentioned, and the conclusion is inevitable that he simply is not empowered to initiate a prosecution by information independently of the district attorney. Woodahl v. District Court, 495 P.2d 182 (Mont. 1972).

Of course, the attorney general may be invited to take over or assist in the prosecution of a criminal case. The judge of a proper court, in extreme cases, require that all available evidence be delivered to the attorney general if the district attorney refuses to prosecute. NRS 173.065. The district attorney through the board of county commissioners may request the assistance of the attorney general to prosecute. NRS 228.130. Moreover, the attorney general may appear in and take exclusive charge of a prosecution when, in his opinion, it is necessary, or when requested to do so by the governor. NRS 228.120(3). This provision, however, contemplates a pending prosecution, since a "prosecution" does not exist until a charge has been filed, and if filed, has not been dismissed

In the matter at hand, the preconditions to attorney general intervention do not exist. He was not invited to act by the judge. He was not requested to act by the district attorney through the board of county commissioners. Neither was there a pending

prosecution. It had been dismissed following preliminary examination, and the accused was discharged.

The power to "supervise" a district attorney which is granted to the attorney general by NRS 228.120(2), means supervision and cannot sensibly be read as a grant of power to usurp the function of the district attorney.

Finally, NRS 228.170 which allows the attorney general to commence or defend a "suit," does not bear upon this case. By using the word "suit" in contrast to the word "prosecution" used in NRS 228.120(3), and the words "criminal cases" used in NRS 228.130, the legislature made clear its intention that the authority of NRS 228.170 embraces only civil matters. Indeed, that section has only been utilized in the civil area. State v. Moore, 46 Nev. 65, 207 P. 75 (1922); State v. Cal. M. Co., 13 Nev. 203 (1878); State v. C. P. R. R. Co. 10 Nev. 47 (1875).

2. The attorney general is a constitutional officer in the executive branch of our government. Art. 5; Sec. 19. He, along with the secretary of state, state treasurer, state controller and superintendent of public instruction "shall perform such other duties as may be prescribed by law." Art. 5; Sec. 22. The phrase "such other duties" is used because art. 5 sec. 20 does, to some extent, specify the duties of the secretary of state. However, duties and powers are not specified for the other mentioned state officers. Such duties and powers were to be legislatively defined. The powers and duties of the attorney general, therefore, are to be found only in legislative enactment. They are not found anywhere in the Constitution of our State.

In declaring the rights of an accused, art. 1, sec. 8 of our Constitution provides, among other things, that one may not be tried for a capital or other infamous crime except "upon presentment or indictment of the grand jury, or upon information duly filed by a district attorney or attorney general of the State . . . ." The right to be tried by information was given by constitutional amendment which became effective in 1912, the purpose of which was to offer an alternative method for criminal prosecution.

The quoted provision is not self-executing. It is simply a lim-

itation on legislative power within which legislation is to be enacted. Wren v. Dixon, 40 Nev. 170, 167 P. 324 (1916). The legislature has responded by defining the duties of the grand jury, NRS ch. 172, the presentment, indictment and information process, NRS chs. 172, 173, the qualifications and duties of the district attorney, NRS ch. 252, and attorney general NRS ch. 228. Consequently, the power of the attorney general to utilize the information process mentioned in art. 1, sec. 8, of our Constitution is to be found in legislative enactment and not otherwise. We have already shown that his power does not encompass the procedure here sought to be utilized.

3. "The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this state, shall be the rule of decision in all courts of this state." NRS 1.030. Assuming, without deciding, that the common law may have granted the attorney general the power he seeks here to exercise, cf. State v. Moore, 46 Nev. 65, 207 P. 75 (1922), such an exercise of power would be repugnant to the statutory law of this state, as we have already explained. Woodahl v. District Court, 495 P.2d 182 (Mont. 1972). The attorney general may not look to the common law to justify his action.

The requested writs are granted. James Ryan is discharged from restraint.

ZENOFF, C. J., and GUNDERSON, JJ., and MCDANIEL, D. J., concur.

MOWBRAY, J. dissenting:

Respectfully I dissent from the majority opinion granting the petition of habeus and prohibition and discharging the petitioner.

The majority has ruled that, absent a request by a district attorney or a request by a district judge or pending litigation already underway, the attorney general is powerless to file a criminal information. I am constrained to disagree with the majority, because in my opinion there is constitutional and statutory authority for the attorney general to proceed as he did in this case.

First, the attorney general is a constitutional officer in the executive branch of our state government. Nev. Const. art. 5, §19.[1] Traditionally, the office of attorney general had its origin in the early English system of jurisprudence. The attorney general was the chief law enforcement officer of the Crown and its legal representative in the courts.

Article 1, section 8, of the Nevada Constitution provides that "(n)o person shall be tried for a capital or other infamous crime . . . except on presentment or indictment of the grand jury, or upon information duly filed by a district attorney, or attorney-general of the state. . . ."[2] An information is a statement by a district attorney or the attorney general to the court that on a certain day a named person committed an offense against the peace and dignity of the State of Nevada.

Article 5, section 22, of the State Constitution provides that the attorney general in addition to his constitutional duties shall perform such other duties as may be prescribed by law.[3] The attorney general has numerous statutory duties and powers. For instance, he may appear before any grand jury when, in his opinion, it is necessary, and present evidence of the commission of a crime. He is expressly given supervisory powers over all the district attorneys of the State in all matters pertaining to the duties of their offices. When, in his opinion it is necessary to do

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[1]Nev. Const., art. 5, § 19:

"A secretary of state, a treasurer, a controller, and an attorney general, shall be elected at the same time and places, and in the same manner as the governor. The term of office of each shall be the same as is prescribed for the governor. Any elector shall be eligible to either of said offices."

[2]Nev. Const., art. 1, § 8:

"No person shall be tried for a capital or other infamous crime (except in cases of impeachment, and in cases of the militia when in actual service and the land and naval forces in time of war, or which this state may keep, with the consent of congress, in time of peace, and in cases of petit larceny, under the regulation of the legislature) except on presentment or indictment of the grand jury, or upon information duly filed by a district attorney, or attorney-general of the state, . . ."

[3]Nev. Const., art 5, § 22:

"The . . . attorney general . . . shall perform such other duties as may be prescribed by law."

so, he may appear in and take exclusive charge and conduct any prosecution in any court in the State for a violation of any law of the State. NRS 228.120.[4] The trial judge having jurisdiction of a crime may require that all available evidence relating to a crime be turned over to the attorney general if the district attorney refuses to prosecute the person charged for such a crime. NRS 173.065.[5]

NRS 173.035, subsection 2, provides that, upon appropriate affidavit of a competent witness, an information may be filed by the district attorney, with leave of the court, following a preliminary examination where the defendant has been discharged.[6] It is true that the statute names only the district attorney therein and does not mention the attorney general. Neither does NRS 173.045, subsection 1, which provides that all informations shall be filed in the court having jurisdiction of the offense named, by the district attorney of the proper county as

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[4]NRS 228.120, in relevant part:

"The attorney general shall have the power:

"1. To appear before any grand jury, when in his opinion it is necessary, and present evidence of the commission of a crime or violation of any law of this state; to examine witnesses before the grand jury, and to draw indictments or presentments for such grand jury.

"2. To exercise supervisory powers over all district attorneys of the state in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business entrusted to their charge.

"3. To appear in and to take exclusive charge of and to conduct any prosecution in any court of this state for a violation of any law of this state, when in his opinion it is necessary, or when requested to do so by the governor."

[5]NRS 173.065:

"The judge of the court having jurisdiction may in extreme cases, upon affidavit filed with him of the commission of a crime, require all available evidence to be delivered to the attorney general for prosecution, if the district attorney refuses to prosecute any person for such crime."

[6]NRS 173.035, in relevant part:

"2. If, however, upon the preliminary examination the accused has been discharged, or the affidavit or complaint upon which the examination has been held has not been delivered to the clerk of the proper court, the district attorney may, upon affidavit of any person who has knowledge of the

informant.[7] I do not interpret the failure to expressly name the attorney general as well as the district attorney in the two statutes cited above as an attempt by the Legislature to bar the attorney general from signing and filing criminal informations, and if such were the legislative intendment, it was in my opinion constitutionally impermissible. The Nevada Constitution states that one may be tried only upon presentment or indictment of the grand jury or upon information duly filed by a district attorney or the attorney general. Nev. Const., art 1, § 8, *supra.*

Under NRS 228.120, subsection 3, *supra,* the attorney general is given the express authority to "appear in and to take exclusive charge of and to conduct any prosecution in any court of this state, *when in his opinion* it is necessary . . ." (Emphasis added.) In my opinion, the natural interpretation of the words, "appear in and take exclusive charge of", is that the attorney general may initiate criminal proceedings against a defendant by signing and filing an information. Indeed, in NRS 228.120, subsection 1, *supra,* he is given the power to proceed by way of indictment.

In view of the broad powers the attorney general is given to intervene in criminal prosecutions and to supervise district attorneys, as well as to appear before grand juries and to draw and present indictments, he should not, in my opinion, be precluded from signing and filing a criminal information.

The majority has relied upon the case of State ex rel. Woodahl v. District Court 495 P.2d 182 (Mont. 1972). That case is

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commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof, upon being furnished with the names of the witnesses for the prosecution, by leave of the court first had, file an information, and process shall forthwith issue thereon. The affidavit mentioned herein need not be filed in cases where the defendant has waived a preliminary examination, or upon such preliminary examination has been bound over to appear at the court having jurisdiction."

[7]NRS 173.045, in relevant part:

"1. All information(s) shall be filed in the court having jurisdiction of the offenses specified therein, by the district attorney of the proper county as informant, and his name shall be subscribed thereto by himself or by his deputy."

distinguishable from this case because the court in Woodahl noted, at 185, that in Montana, unlike Nevada, there is "a complete absence of *any constitutional or statutory power* vested in the attorney general to file an information *or initiate a prosecution* independent of the county attorney." (Emphasis added.)

For these reasons, I would deny the writs and affirm the order of the district judge that the petitioner be held to answer the charge.

APPENDIX "H"

NRS 172.255 provides:

172.255 Finding and return of presentment or indictment; effect of failure to indict.

1. A presentment or indictment may be found only upon the concurrence of 12 or more jurors. The presentment or indictment shall be returned by the grand jury to a judge in open court or, in the absence of the judge, to the clerk of the court in open court, who shall determine that 12 or more jurors concurred in finding a presentment or indictment. If the defendant has been held to answer and 12 jurors do not concur in finding a presentment or indictment, the foreman shall so report to the court in writing forthwith.

2. The failure to indict shall not, however, prevent the same charge from being again submitted to a grand jury or as often as the court shall so direct. But, without such direction, it shall not be again submitted.

(Added to NRS by 1967, 1411; A 1971, 208)

NRS 173.035 provides, in pertinent part:

173.035 Information may be filed following preliminary examination when accused bound over or when preliminary examination waived; when information filed on affidavit; limitation of time.

2. If, however, upon the preliminary examination the accused has been discharged, or the affidavit or complaint upon which the examination has been held has not been delivered to the clerk of the proper court, the district attorney may, upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof, upon being furnished with the names of the witnesses for the prosecution, by leave of the court first had, file an information, and process shall forthwith issue thereon. The affidavit mentioned herein need not be filed in cases where the defendant has waived a

preliminary examination, or upon such preliminary examination has been bound over to appear at the court having jurisdiction.

3. The information shall be filed within 15 days after the holding or waiver of the preliminary examination. All information shall set forth the crime committed according to the facts.

(Added to NRS by 1967, 1412)